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8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF NEVADA**

10 EARNEST L. PHILLIPS,

11 Petitioner,

12 vs.

13 KATHLEEN DELANEY, *et al.*,

14 Respondents.  
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Case No. 2:14-cv-01023-JCM-VCF

**ORDER**

17 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. §  
18 2254, by a Nevada state prisoner.

19 This court has conducted a preliminary review of the petition pursuant to Rule 4 of the Rules  
20 Governing Section 2254 Cases in the United States District Courts. The court concludes that the  
21 petition must be dismissed without prejudice for the reasons discussed below.

22 In the instant case, the petition seeks reconsideration of a decision in an ongoing state  
23 criminal proceeding. Under the circumstances articulated in petitioner's pleadings, this United  
24 States District Court has no jurisdiction to direct a state court's proceedings in an ongoing criminal  
25 case. *See Carriger v. Stewart*, 95 F.3d 755, 762 (9th Cir. 1996) (*overruled on other grounds*, 132  
26 F.3d 463 (9th Cir.1997); *Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989) (per curiam) (collecting  
27 cases), *cert. denied*, 493 U.S. 1012 (1989)).  
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1 In his petition, petitioner admits that his criminal proceedings are still pending in the Nevada  
2 state courts. (ECF No. 1-1). A review of petitioner's case on the electronic filing database for the  
3 Eighth Judicial District Court for the State of Nevada reveals that petitioner's criminal proceedings  
4 in state district court are still pending. (See Register of Actions, case no. C-14-296481-1,  
5 [www.clarkcountycourts.us](http://www.clarkcountycourts.us)). Because plaintiff's criminal proceedings that he challenges in the  
6 instant federal habeas corpus action are still pending in state court, this action must be dismissed,  
7 without prejudice, as discussed below.

8 This action must be dismissed because all of petitioner's federal habeas claims are  
9 unexhausted in state court. None of the grounds presented in the petition have been exhausted in  
10 state court. Those matters are still proceeding in state court. It is appropriate that the state court  
11 have the opportunity to address and resolve any errors that may have occurred in the state court  
12 proceedings. A federal court will not grant a state prisoner's petition for habeas relief until the  
13 prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S.  
14 509 (1982); see also 28 U.S.C. § 2254(b)(1)(A). The exhaustion rule in federal habeas is codified at  
15 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his  
16 claims before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S.  
17 838, 844 (1999); see also *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains  
18 unexhausted until the petitioner has given the highest available state court the opportunity to  
19 consider the claim through direct appeal or state collateral review proceedings. See *Casey v. Moore*,  
20 386 F.3d 896, 916 (9<sup>th</sup> Cir. 2004). Because petitioner has not exhausted his federal habeas corpus  
21 claims in state court, his petition must be dismissed without prejudice.

22 Further, dismissal is appropriate under the abstention doctrine. Under principles of comity  
23 and federalism, a federal court should not interfere with ongoing state criminal proceedings by  
24 granting injunctive or declaratory relief, absent extraordinary circumstances. *Younger v. Harris*,  
25 401 U.S. 37, 44 (1971); *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423,  
26 431 (1982). The *Younger* abstention doctrine applies to claims raised in federal habeas corpus  
27 proceedings. *Edelbacher v. Calderon*, 160 F.3d 582, 587 (9<sup>th</sup> Cir. 1998); *Carden v. State of*  
28 *Montana*, 626 F.2d 82, 83-85 (9<sup>th</sup> Cir. 1980), cert. denied, 449 U.S. 1014 (1980). The *Younger*

1 abstention doctrine applies when: (1) state judicial proceedings are pending; (2) the state  
 2 proceedings involve important state interests; and (3) the state proceedings afford adequate  
 3 opportunity to raise the constitutional issue. *Middlesex County Ethics Comm'n v. Garden State Bar*  
 4 *Ass'n*, 457 U.S. at 432; *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 223 (9<sup>th</sup> Cir. 1994).  
 5 Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without  
 6 hope of obtaining a valid conviction, and perhaps in other special circumstances where irreparable  
 7 injury can be shown, is federal injunctive relief against pending state prosecutions appropriate.  
 8 *Carden v. Montana*, 626 F.2d 82, 83-84 (citing *Perez v. Ledesma*, 401 U.S. 82, 85 (1971)).

9 In the instant case, all prerequisites to the *Younger* abstention doctrine are present. First,  
 10 petitioner is currently the subject of a criminal proceeding in state court, which is ongoing and has  
 11 not reached final adjudication. Second, the State of Nevada has an important interest in protecting  
 12 the public through the prosecution of criminal proceedings. Third, the state court criminal  
 13 proceedings afford an opportunity for petitioner to raise the constitutional claims asserted in the  
 14 federal habeas petition. Finally, petitioner has not demonstrated any extraordinary circumstance  
 15 why this court should not abstain from entertaining the petition. For the reasons discussed above,  
 16 the federal habeas petition is dismissed without prejudice.

17 In order to proceed with his appeal, petitioner must receive a certificate of appealability. 28  
 18 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951  
 19 (9<sup>th</sup> Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9<sup>th</sup> Cir. 2001). Pretrial  
 20 petitioners require a certificate of appealability prior to appealing a denial of relief under 28 U.S.C.  
 21 § 2241. *See Wilson v. Belleque*, 554 F.3d 816, 825 (9<sup>th</sup> Cir. 2009). Generally, a petitioner must  
 22 make “a substantial showing of the denial of a constitutional right” to warrant a certificate of  
 23 appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The  
 24 petitioner must demonstrate that reasonable jurists would find the district court's assessment of the  
 25 constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet  
 26 this threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable  
 27 among jurists of reason; that a court could resolve the issues differently; or that the questions are  
 28 adequate to deserve encouragement to proceed further. *Id.*

1 District courts are required to rule on the certificate of appealability in the order disposing of  
2 a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and  
3 request for certificate of appealability to be filed. Rule 11(a). This court has considered the issues  
4 raised by petitioner in the petition, with respect to whether they satisfy the standard for issuance of a  
5 certificate of appealability, and determines that none meet that standard. The court therefore denies  
6 petitioner a certificate of appealability.

7 **IT IS THEREFORE ORDERED** that petitioner's motion to proceed in *forma pauperis*  
8 (ECF No. 1) is **DENIED AS MOOT**.

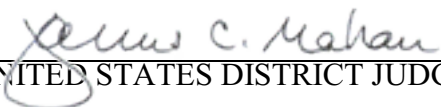
9 **IT IS FURTHER ORDERED** that all pending motions in this action are **DENIED**.

10 **IT IS FURTHER ORDERED** that this action is **DISMISSED WITHOUT PREJUDICE**  
11 to bringing a federal habeas petition once his state criminal proceedings and all state appeals have  
12 concluded.

13 **IT IS FURTHER ORDERED** that the clerk of court **SHALL ENTER JUDGMENT**  
14 **ACCORDINGLY**.

15 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**  
16 **APPEALABILITY**.

17 DATED July 2, 2014.

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20 UNITED STATES DISTRICT JUDGE  
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